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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAFAEL ASTORGA-TORRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(I) Whether the evidence, seized by federal agents in a warrantless search of Petitioner's motel room many hours after Petitioner had been arrested and taken from the motel room, was admitted into evidence at trial in violation of Petitioner's Fourth Amendment right against unreasonable searches and seizures and in direct contradiction with the decisions of this Court in **Mincey v. Arizona**, 537 U.S. 385, and **Stoner v. California**, 376 U.S. 483.

(II) Whether the Court's error in giving the **Jewell** instruction, which the Ninth Circuit held erroneously invited the jury to find that Petitioner was in constructive possession of the heroin possessed by Ambriz, and required reversal of his conviction of Count II

permeated the jury's finding of guilt on Count I and denied Petitioner his Fifth Amendment right to due process of law?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, RAFAEL ASTORGA-TORRES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 26, 1982.

A Petition for Rehearing was denied and the suggestion for Rehearing en banc was rejected by the United States Court of Appeals for the Ninth Circuit on September 20, 1982.

OPINIONS BELOW

A copy of the Ninth Circuit Court of Appeals original opinion filed on March 15, 1982, is attached as Appendix "A". The order of the Court of Appeals requesting Appellants' specific response to Appellees' Petition for Rehearing is attached as Appendix "B". The order of the Court of Appeals denying Rehearing, withdrawing the March 15, 1982, opinion and superseded by the July 26, 1982, opinion is attached as Appendix "C". This superseding opinion is attached as Appendix "D". Lastly, the order of the

Court of Appeals denying Appellants' Petition for Rehearing and Suggestion for Rehearing en banc is attached as Appendix "E".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit became final when the Petition for Rehearing was denied and Suggestion for Rehearing en banc was rejected on September 20, 1982. This Court's jurisdiction is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> "[No person shall] be deprived of life, liberty, or property, without due process of law . . ."

The Fourth Amendment to the Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . ."

STATEMENT OF THE CASE

On June 19, 1980, a federal grand jury for the Eastern District of California indicted defendants, Jose Inez Ambriz-Ambriz (hereinafter referred to as Ambriz), petitioner Rafael Astorga-Torres, (hereinafter referred to as Rafael), and Jesus Torres-Torres (hereinafter referred to as Jesus).

Petitioner Rafael was charged in four counts:

(1) That commencing on or about June 11, 1980 he conspired to distribute heroin.

(2) Count Two (2) of the indictment charged the petitioner with possession with intent to distribute heroin on or about June 11, 1980.

(3) Count Three (3) of the indictment charged the petitioner with assult on federal officers with a deadly weapon.

(4) Count Four (4) of the indictment charged petitioner with the unlawful carrying of a firearm during the commission of a felony.

On June 23, 1980, petitioner Rafael and Jesus entered pleas of not guilty to all counts of the indictment. At a later date, prior to the trial, co-defendant Ambriz entered a guilty plea to the indictment.

On August 22, 1980, petitioner's Motion to Supress Evidence was denied.

Prior to trial the court conducted a hearing to rule on the admissibility of evidence found in the septic tank and ruled that the evidence was admissible.

Throughout the jury trial the petitioner made timely objections to the admissibility of certain evidence and testimony.

On November 24, 1980, at the close of the government's case, petitioner made a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, which motion was denied. (Reporter's Transcript [R.T.] 1367.)

On November 24, 1980, the Court ruled on the use of various jury instructions to which the petitioner made timely objections.

On November 25, 1980, the jury found the petitioner guilty as charged in all counts of the indictment.

On January 19, 1981, petitioner was sentenced to the custody of the Attorney General on Counts I and II and to a concurrent period of twelve years with a six year special parole term, and on Counts III and IV to a concurrent period of three years, to run consecutive to Counts I and II. The petitioner was therefore sentenced to a total period of fifteen years.

On January 19, 1981, petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals.

On March 15, 1982, a panel of the Ninth Circuit Court of Appeals reversed petitioner's conviction of Counts I and

II and remanded the case for a new trial.

On March 27, 1982, the government filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On May 21, 1982, a panel of the Ninth Circuit directed petitioner to respond to the issue of whether a certain statement was inadmissible hearsay.

On July 26, 1982, the same three judge panel of the Ninth Circuit expressly reversed its own opinion of March 15, 1982. The court withdrew its March 15, 1982 opinion, affirmed petitioner's conviction of Counts I, III and IV and reversed petitioner's conviction of Count II.

On August 12, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On September 20, 1982, the Ninth Circuit Court of Appeals denied this Petition and rejected the Suggestion for Rehearing en banc.

STATEMENT OF FACTS

I. Motion To Supress

On August 22, 1980, the Court heard petitioner's Motion to Supress. The government admitted that there was no search warrant obtained for the search of the motel room.

The testimony at the hearing demonstrated that on May 3, 1980, and May 14, 1980, Ambriz, by himself, made hand-to-hand sales of heroin to government agents (R.T. 173-175).

On June 10, 1980, Ambriz told undercover agent Delgado that he was going to make another sale of heroin to him on

June 11, 1980, and that he may bring some guards (R.T. 176). It was, in effect, stipulated that the source of the heroin to Ambriz was an "old man" from Sinoloa, Mexico and therefore not the defendant Jesus or petitioner Rafael (R.T. 194-195).

On June 11, 1980, government agents conducted a surveillance of Ambriz's residence in South Gate, California. Agent Quander testified that on the morning of June 11, 1980, he observed Ambriz alone drive his green Mustang from his residence to the Weatherby Gun Shop and back twice (R.T. 32, 33.). He was then seen driving to a hardware store and back to his residence alone. He was observed leaving his residence again and was lost in traffic. The officers next saw him driving his

Mustang with a passenger identified as defendant Torres. They went to a parking lot near a 7-11 store where they parked. Rafael went over to a blue Camero where he met Jesus. Rafael and Jesus took the Camero and got gas. Ambriz was seen going into the Tri City Gun Shop and purchasing some shells. Later the two cars, with Ambriz in the green Mustang and Rafael and and Jesus in the Camero, were observed driving up Interstate 5 to Tulare County.

Agent Quander testified that at this point they did not have probable cause to obtain an arrest or search warrant (R.T. 43).

Agent Plavan testified that at around 3:00 p.m. on June 11, 1980, the Mustang and the Camero pulled into the parking lot of the Sky Ranch Motel in Tulare

(R.T. 47-48). Ambriz checked into Room 7 and Jesus and Rafael checked into Room 4. Rafael was seen taking a paper bag out of the Camero and bringing it into Room 4, then bringing it back out to the Camero, and then back into Room 4 (R.T. 47).

Agent Delgado testified that Ambriz called them and told him that he was staying in Room 7 (R.T. 178). He testified that the plan was that he would test the heroin in Room 7 (R.T. 178).

Agent Plavan testified that just prior to 5:00 p.m. he went to the motel office and told Mr. Raga, the manager/owner, that they were investigating a narcotics case (R.T. 49-50). At that time he obtained the manager's consent to enter Rooms 4 and 7 (R.T. 51, 132).

Agent Delgado testified that about 5:00 p.m. he met Ambriz alone in the parking lot of the motel. He asked Ambriz where the heroin was and Ambriz told him it was in his room (Room 7). Ambriz went to room 7 and came out with a bag, showed him the heroin, and Delgado walked to his car, ostensibly to get the money (R.T. 180). Agent Delgado then took off his hat which was the prearranged arrest signal, and Ambriz was arrested and taken into custody outside the motel in the parking lot (R.T. 182).

At this point several (which at trial it was determined to be approximately 15) state and federal officers converged on Room 4, banging on the door and yelling in Spanish and English that they were federal police (R.T. 52). About thirty seconds later an officer thought

he heard a clicking sound of a gun inside the room. They immediately kicked in the door, and a gun battle ensued (R.T. 52-54). After approximately ten minutes a tear gas canister was shot at the room and the officers observed the weapons being thrown out of the room (R.T. 55). The petitioner Rafael came out of the room with his hands up (R.T. 55). He had been seriously wounded in the gun battle. He came out, laid face down on the pavement, was arrested and was taken into custody in the parking lot outside the motel room (R.T. 55, 65, 88). Thereafter, Jesus crawled out of the motel room and collapsed on the pavement. He was arrested and taken into custody in the parking lot (R.T. 55, 56, 65.). Jesus was seriously injured in the gun battle (R.T. 88, 156).

It should be noted that at trial it was shown that the officers feared that Jesus was going to die (R.T. 345-346). Both were secured and subsequently taken to a hospital for emergency care.

Agent Plavan testified that he arrested Jesus and Rafael for distribution of heroin and conspiracy to distribute heroin based upon the information that they had been "involved" with Ambriz in the Los Angeles area (R.T. 65).

Agent Delgado testified that they had been advised that there were only three suspects total -- Ambriz, Jesus and Rafael (R.T. 197).

Agent Plavan testified that after he arrested and secured Jesus and Rafael, in the parking lot outside of the hotel, that he entered Room 4 (R.T. 84). As he entered the room Agent Hendrix yelled to

him that all was clear (R.T. 95). He testified that as he understood it, Agent Hendrix had preceded him and had secured the room (R.T. 84). It should be noted that at the trial in this matter Agent Hendrix testified that he had gone into Room 4 and found that there was no one in there and that he said it was secure (R.T. 366, 954).

Agent Plavan then entered the hotel room which he described as being one large room and a bath (R.T. 61). He testified that he visually inspected the main room, walked into the bathroom and heard and saw water running full in the sink. At that time he inspected the toilet bowl and found torn papers, documents and currency. These documents included the drivers' licenses of Rafael and Jesus, a wallet and miscellaneous

money and pictures. He reached into the toilet bowl and put the documents on top of the toilet (R.T. 56). He testified that he did not seize anything at that time (R.T. 90).

Much later that night, without any warrant, the agents returned to the room and searched it and seized the documents in the bathroom and photographed the room (R.T. 191). The next day the agents obtained a search warrant for the automobiles and found nothing (R.T. 101-102, 192).

At the conclusion of the hearing the petitioner's Motion to Suppress the documents found in the toilet bowl in Room 4 was denied. The court stated that it denied the motion on the grounds that the manager consented to the search

and that it was incident to the arrest of the appellants (R.T. 214).

The Ninth Circuit Court of Appeals upheld the denial of petitioner's Motion to Suppress (Appendix "D", Op. at p. 4). The Court found that Agent Plavan's initial warrantless entry into the motel room was proper (Op. at p. 4). The Court reasoned that this entry was justified as a protective search for additional dangerous persons, to guard against threat of fire created by the tear gas canister and to prevent destruction of evidence (Op. at p. 5). Further, the agents could later return without a warrant to retrieve the documents seized from the toilet during the earlier "justifed" entry, because "there was no further prejudicial intrusion upon [petitioner's] privacy, especially

in light of [his] clear abandonment of the seized items." (Op. at p.6.)

II. The Trial

The government's theory of the case was that Ambriz had brought fifteen (15) ounces of heroin with him to the motel, that he delivered seven (7) ounces to Agent Delgado and left the other eight (8) ounces with Jesus and Rafael in Room 4. Further, that Jesus and Rafael initiated a gun battle with the agents for the purpose of destroying the contraband and flushed the "missing" eight (8) ounces down the toilet.

The government offered the following evidence in an effort to prove that Jesus and Rafael actually possessed the eight (8) ounces of heroin which Ambriz

was supposed to, but did not, deliver on June 11.

Ambriz had told the Agent Delgado that he would sell him fifteen (15) ounces of heroin on June 11 at $3,300.00 per ounce for $49,500.00.

On June 10 he told Delgado that he would bring guards with him (R.T. 190-210.) but that the transaction would be with him alone (R.T. 198-199). However on June 11 he handed Agent Delgado a bag containing only 7 condoms each holding one (1) ounce of heroin (R.T. 239-242). A motel brochure was found in Room 7 with the figures seven (7) times thirty-three (33) and at the bottom a total of $49,500.00 (R.T. 1072-1076, 705-745).

These numbers corresponded to the volume Agent Delgado was to receive and the price he was to pay on June 11.

The evidence against petitioner at most showed that he was associated with Ambriz but in no way supported that he knew Ambriz possessed heroin or possessed it himself. The only evidence regarding the petitioner was that he was observed briefly speaking with a lady and Ambriz in the yard of the Ambriz residence on May 14, 1980 (R.T. 397) and that he drove up to the Sky Ranch Motel with Ambriz and Jesus on June 11, 1980, and checked into Room 4 with Jesus. All of the drug transactions and conversations were with and by Ambriz alone.

As the trial court observed there was no proof prior to June 11 that a conspiracy existed, i.e. that anyone other than Ambriz was knowingly involved in the sale of the heroin. Further, as the trial court noted, the evidence at the

end of the government's case at most suggested that on June 10, a conspiracy was about to be formed because of Ambriz's June 10 statement that he was going to bring guards with him (R.T. 1283-1286). Ambriz repeatedly stated that the transaction was to be with him alone (R.T. 198-199, 212).

A vast majority of the testimony during the three week trial related to the May 3 and May 14 heroin transactions between Ambriz and the agents prior to June 11, 1980. These events occurred prior to the alleged date of the conspiracy, without any demonstrated involvement or presence of the petitioner. Over petitioner's objection, the Court admitted into evidence the heroin purchased from Ambriz on May 3, May 14 and June 11 and denied petitioner's motion

to strike testimony regarding the acts and declarations of Ambriz prior to June 11 (R.T. 1269, 1322).

Agent Delgado testified that on May 3, 1980, he and Agent Camarena met with Ambriz alone and had a conversation with him in which they purchased an ounce of heroin from him for $3,350.00 (R.T. 173-175). He testified that at that time he told Ambriz that if they liked the heroin they "would get in contact with him, and probably order up some more." (R.T. 175.) The condom of heroin he received on May 3, 1980, was identified by the witness (R.T. 176).

Agent Delgado testified that after May 3, 1980, he had additional conversations with Ambriz (R.T. 178). He testified that on May 14, 1980, he purchased two ounces of heroin from Ambriz alone

for a total of Sixty-six Hundred Dollars ($6,600.00) (R.T. 178). He then identified the heroin purchased on that date (R.T. 179).

He testified that between May 14 and June 11, 1980, he had several conversations with Ambriz negotiating the delivery of heroin (R.T. 183). He testified that they spoke about the purchase of thirty ounces of heroin for $99,000.00 (R.T. 183-184).

The court agreed with the petitioner that the statements or conduct of Ambriz made prior to the formation of the alleged conspiracy were not admissible against petitioner (R.T. 1288-1289). Further, that there was no way the prosecutor could tie Jesus or Rafael to the May 3 transaction (R.T. 1288-1289). The court ultimately ruled that the evidence

was admissible against Jesus and Rafael on the grounds that it was relevant to the case and that it tended to establish a "course of conduct" by Ambriz (R.T. 1327). Accordingly, the Court gave a limiting instruction (R.T. 1498-1501).

The government's comments during argument on the admissibility of Ambriz's conduct and statements reveal that without this evidence "all [the government had] is seven ounces of heroin and some heroin found in condoms in the septic tank." (R.T. 1291, lines 16-19; see below.)

The prosecutor argued that the acts and declarations of Ambriz prior to June 11, 1980, were necessary to prove that "Jesus and Rafael were members of the conspiracy to distribute heroin on June 11, that Jesus and Rafael were in

possession of heroin with the intent to distribute it, and that Jesus and Rafael initiated a gun battle with the agents for the purpose of disposing of the contraband." (R.T. 1314.)

The government offered the following evidence to show that Jesus and Rafael had flushed the "missing" eight (8) ounces down the toilet.

Approximately two months after the arrest of Jesus and Rafael, federal agents pumped out one of the septic tanks of the motel and found twelve (12) condoms. Three of these were saved and admitted into evidence at trial. Two of the condoms were partially torn and had knots on the end (R.T. 253-258). The third condom had some liquid and substance in it (R.T. 251-252).

The condoms were analyzed and the partially torn condoms contained no controlled substance. The one condom with the substance in it was analyzed and found to contain heroin of seven percent (7%) purity (R.T. 842-844). The heroin seized from Ambriz on June 11 was found to be fourteen percent (14%) pure (R.T. 830-837). The chemist testified that the liquid from the septic tank in the condom would lower the percentage of purity of the heroin (R.T. 842).

There were several septic tanks at the motel and room 4 and other rooms flushed into the septic tanks where the evidence was found. Room 7 and other room flushed into other tanks (R.T. 695).

The evidence showed that the heroin seized from Ambriz on June 11, 1980, was

tied in Trojan condoms with a date of 1-80, that the two partial condoms found in the septic tank were Trojan condoms dated 12-79 and that the "full condom" was a Trojan condom but that you could not read the date. All that could be seen was the number 9 (R.T. 844-847). Mr. Brenner of Young's Rubber Corporation, who manufacture Trojan condoms, testified that a Trojan condom dated 12-79 would probably reach the market by February, 1980, but not before December, 1979 (R.T. 641-7).

The documents found in the toilet of Room 4 were analyzed and the chemical acetylmorphine was found on them (R.T. 848-849). The chemist testified that acetymorphine can be formed by the breaking down of heroin when mixed with water (R.T. 852).

Rafael was seen walking out to the Camero and picking up a brown paper bag and walking into Room 4 and then back out to the car with the bag and back into the room (R.T. 491-496). No brown paper bag was found in Room 4 (R.T. 1250).

During the trial, this testimony was thoroughly impeached. The testimony at trial revealed that by the time the septic tank was pumped by the agents in August, 1980, it had not been emptied for almost a year (R.T. 700). Mr. Raga, the motel manager, testified that the eight toilets for Rooms 1, 2, 3, 4, 30, 31, 32 and 33 flush into the subject septic tank (R.T. 701). He testified that between the period of January, 1980, and August, 1980, alone the rooms had been rented out to various people

for two hundred and twenty-one (221) days (R.T. 704). There were times when people would rent these rooms for only a few hours and that he gets sort of a "mixed clientele", charging $18.00 to $22.00 per night (R.T. 753-755). He admitted that during this time he had called the Sheriff's Department to come out to evict people who were not welcome there (R.T. 702). He said that during this ten month period he personally called the police to his motel to kick out people three or four times (R.T. 763).

The testimony of Agent Delgado revealed that when he pumped out the tank in August, 1980, two months after the arrest of appellants, he found and took at least twelve other condoms (R.T. 254, 269.). He testified that there were

still others that could have gone through the screen and not been caught (R.T. 281). He testified that he looked at these condoms and threw out all but the three he saved for evidence (R.T. 254). He was not sure if the condoms he discarded were Trojan condoms and didn't note the dates of any of them (R.T. 273). He testified that he discarded them because he did not think they were important because they were not tied at the top (R.T. 254). Appellants moved to dismiss on the grounds of destruction of evidence and the motion was denied (R.T. 282).

Mr. Brennen of the Young Drug Products Corporation, who manufacture Trojan condoms, testified that his company manufactured approximately twelve million Trojan condoms in December, 1979,

and that twenty percent are distributed in the west (R.T. 654-663). He testified that it is possible for a 12-79 condom to reach a retail market after a January, 1980, condom (R.T. 662).

Mr. James A. Heagy, a forensic chemist for the U.S. Department of Justice, Drug Enforcement Administration, was called by the prosecution (R.T. 830). He testified that he analyzed some of the papers which were found in the motel room toilet and found that there was a very small "trace" of acetylmorphine on some of the papers (R.T. 850, 873). He testified that acetylmorphine can be chemically formed with heroin breaks down but that he could not say that the trace of acetylmorphine found on the paper was from any heroin in the toilet and could not tell when, or if, the

papers had come in contact with heroin (R.T. 854). He testified that normally heroin would break down into acetylmorphine quickly, after a period of days it would be all gone, and he did not get the papers until after the state laboratory had analyzed them (R.T. 861).

Stephen John O'Clair of the California Department of Justice, Fresno Regional Laboratory, testified that he analyzed the documents on June 20, 1980, before they went to Mr. Heagy of the D.E.A (R.T. 879). He testified that he examined the papers under a stereomicroscope looking for any kind of powder residue and did not find any. He found some powder residue in the wallet but the tests he ran were negative for any drugs. He testified that, in his opinion, if papers were dumped into a toilet

with heroin, it would leave a microscopic residue and that there was none present on the subject papers when he examined them (R.T. 889-890).

The state chemist also testified that when he examined the papers, he placed them on a work bench, which, over the years, had contained heroin and that it is possible that the fibers of the papers would have absorbed the heroin on the work bench (R.T. 893).

It should be noted that although Agent Plavan testified that he thought the water in the toilet in Room 4 was brown when he saw it, Detective Diaz, who was in charge of the crime scene investigation and who was assigned the task of observing, marking and preserving the evidence, testified that the

water in the toilet was clear (R.T. 522, 1222, 1263).

The government seemed to point out the fact that the petitioner had been seen carrying a paper bag into Room 4 and that the bag was not found by the agents in the room, thereby implying that it was flushed down the toilet with the drugs. However, no bag or remnants of a bag was found in the septic tank. Agent Diaz did testify that he found discarded paper bags when he was searching the parking lot area (R.T. 1266).

Agent Rodriguez testified that he is able to detect the odor of heroin and that if there was a large amount of heroin in that room, even if completely sealed in rubber condoms, he could smell it as soon as he walked through the door (R.T. 1155, 1166).

No one testified that they detected any smell of heroin in Room 4. No one testified that they saw petitioner at any time have, hold or dispose of any heroin. No one testified that they heard the sound of a flushing toilet from Room 4 at any time from the time the officers announced their presence to the time of the arrest.

The court denied petitioner's motion for judgment of acquittal pursuant to Rule 29 as to Counts I - IV (R.T. 1367).

III. Jewell Instruction

Over the objection of the petitioner, the Court ruled that it would give the following instruction based upon the holdings in the cases of **United States v. Jewell**, 532 F.2d 911, and **United States v. Valle Valdez**, 554 F.2d 911:

"If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the Indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin. Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely, that Ambriz-Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact." (R.T. 1506.)

The petitioner argued that the instruction was not applicable and highly prejudical since (1) neither appellant took the stand, and there was no evidence that they ever denied anything; (2) there was no evidence that pointed

in the direction of deliberate ignorance; and (3) this instruction has not been applied nor should be applied to the facts present before this Court (R.T. 1395-1397).

The Court not only proceeded to give this instruction to the jury, but emphasized its importance by reading the instruction twice, stating in between each reading, "I am going to read this to you again -- because it's -- you've got to deal with this instruction carefully and deliberately." (R.T. 1505-1506.) At the conclusion of the trial the petitioner was found guilty on all counts.

The Ninth Circuit found that the court erred in giving the **Jewell** instruction and this error was far from

harmless. The court reversed petitioner's conviction of Count II (the substantive possession count), but affirmed petitioner's conviction of Count I (conspiracy to distribute heroin). (Appendix "D", Op. at p. 10.)

REASONS FOR GRANTING THE WRIT

I. THE EVIDENCE SEIZED BY FEDERAL AGENTS IN A WARRANTLESS SEARCH OF PETITIONER'S MOTEL ROOM, MANY HOURS AFTER PETITIONER HAD BEEN ARRESTED AND TAKEN FROM THE ROOM, WAS ADMITTED INTO EVIDENCE AT TRIAL IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND THE DECISION OF THIS COURT IN MINCEY V. ARIZONA, 537 U.S. 385 AND STONER V. CALIFORNIA, 376 U.S. 483 (1964).

The Ninth Circuit erroneously held that the subsequent search of the petitioner's motel room, without a warrant,

many hours after Jesus' and the petitioner's arrest, was justified on the theory that the petitioner abandoned the seized items when arrested (Appendix "D", Op. at p. 6). This holding is contrary to the overwhelming weight of authority. See, **Eng Fung Jem v. United States**, 281 F.2d 803 (9th Cir. 1960); **United States v. Agapito**, 620 F.2d 324 (2d Cir. 1979); **Mincey v. Arizona**, 437 U.S. 385 (1978); **Stoner v. California**, 376 U.S. 483 (1964).

There is no question that petitioner had a right to privacy in his motel room. In **Eng Fung Jem v. United States**, **supra**, state and federal officers conducted a warrantless search of appellant's motel room and seized the drugs. In reversing the conviction, the court stated:

> "Surely the guarantee of the Fourth Amendment may not be compromised by nice distinctions as to the length of time a defendant remains as a guest of the hotel at which he is stopping. The right of privacy must be accorded with equal vigor both to transient hotel guests and to occupants of private, permanent dwellings."
> **Eng Fung Jem v. United States, supra, at 805.**

It should be noted that this right to privacy is not forfeited or waived merely because there was a shootout during a narcotics raid. See, **Mincey v. Arizona, 437 U.S. 385, 391 (1978).**

It is well-settled that a person has a reasonable expectation of privacy in a motel room that cannot be relinquished by a motel clerk. **Eng Fung Jem v. United States, supra; Stoner v. California, supra.**

Neither can the search be justified, as the Ninth Circuit held, as a "security check" in order to insure that no additional persons or danger was within (Appendix "D", Op. at p. 5). The police could not have reasonably believed that additional dangerous persons were present. Cf. United States v. Gardner, 627 F.2d 906, 911 (9th Cir. 1980). Jesus and Rafael had been under constant surveillance for many hours, the agents clearly knew and were in fact advised that there were only three suspects involved (Ambriz, Rafael and Jesus) (R.T. 197), and at no time did the agents hear or see anyone in the room other than Jesus and Rafael who, by the time of entry, were under arrest.

As in United States v. Agapito, 620 F.2d 324, 336 (2d Cir. 1980), the

"security check" exception to the warrant requirement is inapplicable. In Agapito, the agents' constant surveillance for two days indicated the room was empty; the agents at one point looked through the open door and never saw or heard anyone in the room other than the appellants who were under arrest at the time of the entry.

Moreover, in the present case, Officer Hendrix had checked the room and told Agent Plavan that all was clear before Agent Plavan entered the room. (R.T. 84, 366, 954) Thus, there was no reason for Agent Plavan to enter and search the room.

Contrary to the Ninth Circuit's holding, Agent Plavan's entry was not reasonable to guard against preserving evidence from possible destruction. At

the time of the arrest, the officers had every reason to believe that Ambriz alone had all the drugs in Room 7. Ambriz had previously told the agents that the drugs were in Room 7 and in fact went to Room 7 to get the drugs. There was no reason to believe that any of the drugs were in Room 4.

Petitioner submits that the search and seizure of evidence in Room 4 did not fall within any recognized exception to the warrant requirement.

ARGUMENT

It is well-established that evidence obtained by a federal officer as a result of an illegal search and seizure is inadmissible into evidence in a federal prosecution. The exclusionary rule extends to any evidence obtained as a

result of information or leads received or secured by means of an unreasonable search and seizure. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

It is also settled law that a warrantless search can survive constitutional inhibition only upon a showing that it comes within a recognized exception to the rule that a search must rest upon a search warrant; e.g., if the search is contemporaneous with an arrest and confined to the vicinity thereof, or that a search is made with consent. In our case, since there was no search warrant, and the burden thus fell upon the government to establish that the search falls within some exception to the warrant requirement. Stoner v.

California, 376 U.S. 483, 486 (1964); **Jones v. United States**, 357 U.S. 493, 499 (1958); **United States v. Mapp**, 476 F.2d 67 (2nd Cir. 1973); **Agnello v. United States**, 269 U.S. 20 (1925); **Jeffers v. United States**, 342 U.S. 48, 51 (1951).

The petitioner respectfully submits that there was no probable cause to arrest the petitioner or to search the bathroom. As set forth in the statement of facts herein, Agent Quander admitted that at the time the petitioner was seen driving to Tulare, they had no probable cause to arrest him. There was nothing that the petitioner did subsequent to that time which would have provided sufficient cause to arrest him for conspiracy to distribute heroin or possession of heroin. All the petitioner did

was check into motel Room 4 and was seen carrying a bag into the room. At the time of the arrest, the officers had every reason to believe that Ambriz alone had all the drugs in Room 7 and there was no reason to believe that any of the drugs were in Room 4. Ambriz had previously told the agents that the drugs were in Room 7 and in fact went to Room 7 to get the drugs.

At the time the officers attempted to arrest the petitioner, the only information known to them was that the petitioner had been in the company of Ambriz. Mere association with Ambriz and presence on the scene is not sufficient to find that they were in possession of contraband. **Arellanes v. United States**, 302 F.2d 603, 606 (9th Cir. 1962);

United States v. Camacho, 528 F.2d 464 (9th Cir. 1976).

Should this Court decide, however, that there was probable cause to arrest the petitioner, it is well established that a finding of probable cause cannot of itself justify a search without a search warrant. Johnson v. United States, 333 U.S. 1068, 92 L.Ed. 436 (1948); Eng Fung Jem v. United States, 281 F.d 803 (9th Cir. 1960).

Petitioner contends that the trial court erred in finding that the search was not justified by the consent of the motel manager. It is well-settled that a motel clerk does not have the authority to give consent to a police search of a guest's room. Stoner v. California, supra, See also, Chapman v. United States, 365 U.S. 610 (1961), (landlord

has no authority to consent to search of tenant's rented premises).

Finally, petitioner respectfully submits that the search and seizure cannot be justified as incident to the lawful arrest of petitioner.

In the landmark case of **Chimel v. California**, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that a search incident to a lawful arrest made without a warrant can extend only to areas within the defendant's immediate control which was construed to mean the area from which he might gain possession of a weapon or destructible evidence. The court clearly stated in that case that there is no justification for searching rooms other than that in which the arrest occurred pursuant to the arrest.

In **Vale v. Louisiana**, 399 U.S. 30, 90 S.Ct. 1969 (1970), the court held that a "search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest'".

In **Vale**, the appellant was arrested on the front steps of the premises immediately after the arresting officers had observed a sale of narcotics. The court held that a warrantless search of the house was illegal and could not be justified as a search incident to an arrest, stating that if the search is to be upheld as incident to the arrest, the arrest must take place inside the house, not somewhere outside -- whether two blocks away, twenty feet away or on the sidewalk near the front steps. The

search must be constitutionally confined to the area within the arrestee's reach at the time of his arrest. Vale v. Louisiana, supra, citing Chimel v. California, supra.

In the matter before this Court, both Jesus and Rafael were arrested outside of the motel room in the parking lot. They had been seriously wounded, were totally secured and in custody in the parking lot before the officers entered the motel room. Although the officers knew there were only two possible suspects that had been in the room, Officer Hendrix secured the room and advised Agent Plavan that all was clear. It was only after all was secured that Agent Plavan went into the motel room and discovered the documents in the toilet. Even then, he did not seize the

evidence. It was not until approximately midnight that night, long after both Jesus and Rafael were in custody at the hospital, did the agents go back into the motel room and seize the documents. This search and seizure, without warrant, can hardly be said to have occurred contemporaneously with the arrest of petitioner and Jesus in an area within their immediate control.

The petitioner respectfully contends that there was no reason why the officers should not have been required to obtain a warrant.

For all of the foregoing reasons, the motion to suppress should have been granted.

II. THE COURT'S ERROR IN GIVING THE JEWELL INSTRUCTION, WHICH THE NINTH CIRCUIT HELD ERRONEOUSLY INVITED THE JURY TO FIND THAT PETITIONER WAS IN CONSTRUCTIVE POSSESSION OF THE HEROIN POSSESSED BY AMBRIZ, AND REQUIRED REVERSAL OF HIS CONVICTION OF COUNT II, PERMEATED THE JURY'S FINDING OF GUILT ON COUNT I, AND DENIED PETITIONER HIS FIFTH AMENDMENT RIGHT IN DUE PROCESS OF LAW.

The Ninth Circuit agreed with petitioner that the trial court erred in giving the Jewell instruction. The district court twice instructed the jury as follows:

> "If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the Indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was

going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin. Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely, that Ambriz-Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact." (R.T. 1506.)

The Ninth Circuit properly found that the **Jewell** instruction was not appropriate in this case where the petitioner did not claim lack of knowledge and no facts pointed in the direction of deliberate ignorance. (Op. at.p.9); **United States v. Erwin**, 625 F.2d 838 (9th Cir. 1980); **United States v. Maretta-Bejanno**, 552 F.2d 1323, 1325 (9th Cir. 1977). The Ninth Circuit articulated the prejudice suffered in this case.

"A given here, the instruction invited the jury, if unable to

> conclude that appellants had been in actual possession of the eight ounces of heroin, to find that they were in constructive possession of the seven ounces possessed by Ambriz. To find such constructive possession, the instruction required the jury to find only that appellants knew, or should have known, that Ambriz had heroin he planned to sell. Yet we have held that '(m)ere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession."
> **United States v. Batimana**, 623 F.2d 1366, 1369 (9th Cir.) cert. denied, 499 U.S. 1038 (1980).

Because the government's case as to the actual possession was not without its elements of doubt, the court's error in instructing the jury as to constructive possession was far from harmless.

The court emphasized the instruction by repeating it twice and telling the jury, "You've got to deal with this instruction carefully and deliberately."

(R.T. 1505-1506.) It was the only instruction which the court read twice.

The Ninth Circuit found that this error required reversal of Count II (the substantive possession count).

Petitioner contends, as he did before the Ninth Circuit, that the prejudicial error of the **Jewell** instruction not only permeated Count II of the Indictment (the substantive possession count) but also must, of necessity, have permeated the finding of guilt on the conspiracy charge (Count I) since petitioner's knowing possession was, by the prosecutor's own admission, an integral part of the conspiracy charge.

It is well-settled that errors involving an instruction which states an unconstitutional presumption are "harmful per se". See, Vaccaro v. United

States, 461 F.2d 626 at 635 (5th Cir. 1972). "When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict." Chapman v. California, 386 U.S. 18, at 44, 87 S.Ct. 824 at 838, 17 L.Ed.2d 705 at 721-722; Vaccaro v. United States, supra, at 635 (emphasis in original).

In the matter before this Court, the Ninth Circuit properly found that the Jewell instruction erroneously allowed the jury to presume that the petitioner was in constructive possession of the heroin possessed by Ambriz. Based upon this clear error, the Court reversed the possession count. The Court admits that there was doubt in the government's case

as to any actual possession by the Petitioner. Under these circumstances, it is inconceivable that the jury could not have relied upon their erroneous finding of constructive possession in finding the petitioner guilty of conspiring with Ambriz to possess the heroin as alleged in Count I.

Both the trial court and the prosecutor acknowledged that the Jewell instruction applied to Count I as well as to Count II and that the jury could rely on it to find guilt as to both counts (R.T. 1414, 1415). This Court cannot be assured that the jury did not decide Count II first and then after having used erroneous criteria to find possession did not use the finding of joint possession to conclude that the Petitioner had also conspired to possess and

distribute the heroin. This monumental error as well would require a reversal of the judgment on Count I.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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